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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1975

No. 74-1516

FELIX J. PRESLEY,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

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IN THE

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. . . . . TERM, 1975

No.

FELIX J. PRESLEY,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi, entered on February 10, 1975, affirming petitioner's conviction of assault and battery by the Circuit Court of Madison County, Mississippi.

OPINION BELOW

Petitioner's conviction was affirmed without opinion by the Supreme Court of Mississippi. The memorandum Opinion reported at 308 So. 2d 85 (Miss. 1975) is set

out in Appendix A. Rehearing was denied on March 3, 1975.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on February 10, 1975. Rehearing was denied on March 3, 1975. This Court has jurisdiction under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the petitioner's rights to due process and equal protection of the laws and his Sixth Amendment right to effective assistance of counsel were denied by his retained counsel's failure to timely file a notice to the court reporter to transcribe his/her notes as required by Section 9-13-33(1), Mississippi Code (1972) which resulted in the court reporter's notes of the trial testimony being stricken by the Mississippi Supreme Court on appeal, leaving petitioner with only an abbreviated right to appeal.

STATEMENT OF THE CASE

Appellant appealed to the Mississippi Supreme Court from his conviction of assault and battery in the Circuit Court of Madison County, Mississippi. Appellant argued on appeal that the jury instructions granted to the state of Mississippi were prejudicial comments on the weight of the evidence, gave undue prominence to certain parts of the testimony, and erroneously commented on the standard to be used by the jury in weighing the testimony and credibility of the accused.

Appellant's retained counsel timely perfected on appeal as required by the statutes of the state of Mississippi; however, counsel failed to comply with Section 9-13-33(1), Mississippi Code (1972) which requires that notice be given within ten days after the adjournment of the term of court to the court reporter to transcribe his/her notes. The pertinent sections of Section 9-13-33,

Mississippi Code (1972) are set out in Appendix B. Counsel did not give the required notice to the court reporter until twenty-one days after the adjournment of the term of court.

On appeal the appellee, the state of Mississippi, moved to strike the court reporter's notes of the trial testimony. The motion was sustained by the Supreme Court of Mississippi without opinion, and the court reporter's notes were stricken from the record.

As a result of the striking of the court reporter's notes, petitioner was left with only an abbreviated right of appeal. Because the notes of the testimony were no longer a part of the record, the Supreme Court of Mississippi had no testimony before on which to consider the merits of petitioner's contentions that the instructions granted to the state were comments on the weight of the evidence, gave undue prominence to certain portions of testimony and commented erroneously on the standard to be used by the jury in evaluating the weight and the credibility of the accused's testimony. Similar instructions have been condemned in prior decisions of the Mississippi Supreme Court. Without the transcript, however, Appellant could not prove he had, in fact, testified at his trial.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Mississippi in this case has decided a federal question of substance not heretofore explicitly determined by this Court, namely whether or not a person who retains counsel may later raise a claim of ineffective assistance of counsel. Although this Court has not explicitly determined this issue, the decision of of the Supreme Court of Mississippi does not accord with the spirit of prior decisions of this Court on a defendant's right to appeal and right to effective assistance of counsel.

ARGUMENT

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), established that the Sixth Amendment's requirement that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense" is made obligatory on the States by the Fourteenth Amendment. This Court held that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him." 372 U.S. at 344, 83 S.Ct. at 796. **Gideon** stands clearly for the propisition that a defendant who is charged with a felony has a federal constitutional right to have counsel appointed for him if he is unable to employ a lawyer to represent him. **Argersinger v. Hamlin,** 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972), extended this right to assistance of counsel to persons in misdemeanor prosecutions in which the accused may be incarcerated. Furthermore, this Court has long recognized that an indigent's right to counsel includes the right to **effective** assistance of counsel. **See, McMann v. Richardson,** 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970), **Reece v. Georgia,** 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955); **Michel v. Louisiana,** 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83 (1955); **White v Ragen,** 324 U.S. 760, 65 S.Ct. 978; 89 L.Ed. 1348 (1945); **Glasser v. United States,** 315 U.S. 60, 62 S.Ct. 457; 86 L.Ed. 680 (1942); **Avery v. Alabama,** 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); **Powell v. Alabama,** 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

Powell v. Alabama, supra, first interpreted the Sixth Amendment right to assistance of counsel to mean the **effective** assistance of counsel. The Court there held that the trial court's failure" to make an effective appointment of counsel" had resulted in "denial of effective and substantial aid . . .[D]efendants were not accorded the right to counsel in any substantial sense." 287 U.S. at 53, 71, 53 S.Ct. at 65.

In **Avery v. Alabama, supra,** the Court held that "The constitution's guarantee of counsel cannot be satisfied by mere formal appointment." 308 U.S. at 446, 60 S.Ct. at 322. In **Avery** the denial of a continuance by the trial judge which had been requested by defendant's appointed counsel did not deprive the defendant of the effective assistance of counsel because "[h]is appointed counsel . . . have performed their "full duty intelligently and well." 308 U.S. at 450, 60 S.Ct. at 324.

Two years after **Avery** in **Glasser v. United States, supra,** the Court held that an inadequate performance by counsel would render a conviction void. The Court overturned Glasser's conviction where his attorney was appointed by the trial court to represent one of Glasser's co-defendants who had a potentially conflicting interest and defense. Although it is not clear from the opinion whether Glasser had retained his attorney or not, it is indicated by the opinion. The Court held that the attorney's representation of Glasser was not as "effective" as it might have been had the appointment not been made. Glasser's "right to have the effective assistance of counsel, guaranteed by the Sixth Amendment" was denied by the trial court's action. 315 U.S. at 76, 62 S.Ct. at 468.

In **White v. Ragen, supra,** this Court held that it was "a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aide and assistance of counsel." 324 U.S. at 764, In **Reece v. Georgia, supra,** the Court decided that the accused's effective assistance was denied by the trial court's action in not appointing him an attorney in sufficient time for him to object to the systematic exclusion of blacks from the grand jury which indicted him.

McMann v. Richardson, supra, dealt with the question of whether the advice rendered by a court-ap-

pointed attorney was such as to provide the accused with effective assistance of counsel. In concluding that the advice was not such as to deny the defendant effective aid, the Court held that the advice given by an attorney must be "within the range of competence demanded by attorneys in criminal cases." 397 U.S. at 771, 90 S.Ct. at 1449. The Court further held that the accused has the right to "effective assistance of competent counsel." 397 U.S. at 771, 90 S.Ct. at 1449.

This Court has specifically dealt with the rights of indigent defendants against discrimination in the perfecting and filing of their appeals. In **Griffin v. Illinois,** 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1966), this Court held that where an indigent defendant was denied the right to an appeal on the full transcript of the record because of his inability to pay for the transcript, due process and equal protection of the laws were denied to him. Later in **Douglas v. California,** 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963) , this Court held that counsel must be appointed for an indigent defendant on appeal. Furthermore, in **Rodriquez v. United States,** 395 U.S. 327, 89 S.Ct. 1715 (1969) this Court considered an allegation that a criminal defendant had been fradulently deprived of his appeal by his retained counsel. Although the Court did not specifically reach the issue of whether or not counsel's error deprived the defendant of effective assistance of counsel, the Court did reverse because of the failure of the trial judge to inquire into the circumstances surrounding retained counsel's attempt to gain leave to appeal **in forma pauperis.**

This Court has consistently invalidated those procedures "where the rich man, who appeals as a right, enjoys the benefit of counsel's examination of the record, research of the law, and marshalling of arguments on his behalf . . . is forced to shift for himself." 372 U.S. at 358, 83 S.Ct. at 817. In **Entsminger v. Iowa,** 386

U.S. 748, 87 S.Ct. 1402 (1967), this Court considered a court-appointed counsel's failure to file the entire record of the defendant's trial. The Court held that the attorney's action denied the defendant adquate and effective review. This action, which left the defendant with only an abbreviated right to review on appeal is analogous to the case now before the Court in which petitioner requests this Court to grant certiorari. The only substantial difference between the two cases is that in the instant case petitioner's counsel was retained rather than appointed.

This Court has never drawn a distinction which afforded an indigent defendant more rights than one who could afford to hire an attorney. Since **Powell v. Alabama, supra,** decided in 1932, the decisions of this Court have consistently attempted to apply the same standards of effective representation to both the rich and the poor. Where a defendant has been denied effective assistance of counsel, decisions of this Court make it inferentially clear that it does not matter whether his counsel was court-appointed or retained. It is obvious that the prejudice to the defendant which arises from the failure to have effective representation results whether counsel is appointed by the court or employed by the defendant. Because counsel in the instant case failed to timely file the notice to the court reporter, petitioner was denied his right to a full review of his conviction by the Supreme Court of Mississippi. In fact, counsel's failure to file the notice so that the reporter's notes of the testimony would be included in the record effectively denied him the right to any kind of meaningful appeal. As the action of the Mississippi Supreme Court in striking the notes was contrary to the letter and spirit of prior decisions of this Court, petition-

er respectfully requests that this writ of certiorari be granted so that petitioner might have a full and fair hearing on the merits of his appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A

Felix J. Presley

v.

State of Mississippi.

No. 48263.

Supreme Court of Mississippi.

Feb. 10, 1975.

Rehearing Denied March 3, 1975.

Appeal from Circuit Court, Madison County; Rufus H. Broome, Judge.

W.S. Moore, Julie Ann Epps, Thomas J. Ginger, Jackson, for appellant.

A.F. Summer, Atty. Gen., by Catherine Walker, Sp. Asst. Atty. Gen., Jackson, for appellee.

Before GILLESPIE, C.J., and INZER and BROOM, JJ.

Affirmed.

APPENDIX B

Section 9-13-33. Trial—transcript.

(1) In all cases in which the trial is noted by the official court reporter, any person desiring to appeal the case shall notify the court reporter in writing within ten (10) days after adjournment of court of the fact that a copy of the notes is desired. The notice must be handed to the court reporter personally or mailed to him at his usual place of abode. In either case the attorney making the request shall file with the clerk of the court a copy of the notice with a statement of how the notice was served, and a copy thereof shall in like manner be served upon appellee's attorney, and the said notice shall designate the portions of the record, proceedings, testimony and evidence to be contained in the record of appeal.

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vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as *Felix J. Presley* v. *State*, 308 So.2d 85 (Miss. 1975). Rehearing was denied on March 3, 1975. A copy of the opinion is before this Court as an Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. Section 1257(3). Petitioner has posed one question for review. Jurisdiction is improperly invoked under said authority as hereinafter set forth in Respondent's argument.

QUESTION PRESENTED

Petitioner's question, as here stated, was never presented to the Mississippi Supreme Court. Correctly redrafted, the question should be was Petitioner's claim, that his right to effective assistance of counsel was denied by his retained counsel's failure to timely file a notice to the court reporter to transcribe the notes for appeal, ever presented to the Mississippi Supreme Court?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments VI and XIV, Section 1; however, as hereinafter set forth, said provisions are not properly before this Court.

STATEMENT OF THE CASE

On March 6, 1974, in the Circuit Court of Madison County, Mississippi, Petitioner was indicted for assault and battery. After trial by jury, Petitioner was convicted and sentenced to pay a fine of $500.00 and to serve six (6) months in the Madison County Jail with four (4) months of the jail sentence suspended pending five (5) years good behavior.

On appeal to the State Court, Petitioner's brief argued against three (3) jury instructions. Petitioner's retained counsel had failed to give timely notice to the court reporter that a copy of the notes was desired for appeal, which resulted in the transcription of the notes being stricken from the record on motion by the State. Although

the notes were stricken, the three (3) jury instructions complained of still remained to be examined on appeal.

Section 9-13-33, Mississippi Code of 1972 requires that notice be given to the court reporter within ten (10) days after adjournment of the Circuit Court from which a copy of the notes is desired for appeal. A copy of the applicable part of this statute is before this Court as an Appendix B to the Petition for Writ of Certiorari. At the time of its order to strike the notes, the Mississippi Supreme Court had held in all cases examined by the State that notice to the court reporter was jurisdictional, and unless the statutory mandate was met, the notes would be stricken on appeal upon the motion of the adverse party. The record reveals that notice was not given until twenty-one (21) days after adjournment of the Circuit Court which is clearly in excess of the statutory period of time allowed. The Mississippi Supreme Court never decided the issue of whether Petitioner was denied effective assistance of counsel by his retained counsel's failure to give timely notice to the court reporter of his intention to appeal. The only question presented was whether or not the notes should be stricken. Petitioner's response to the State's motion to strike presented nothing more than a mere allegation that retained trial counsel was ineffective, because he failed to give timely notice. There was no attempt on Petitioner's part to show ineffectiveness of counsel. No proof was offered to the trial court or the State Supreme Court. The court ordered the notes stricken without written opinion, and Respondent maintains it did so without relying on federal or state Constitutional grounds. Neither Petitioner's reply brief nor brief in support of his petition for rehearing argued the question now presented. The State Supreme Court affirmed the Petitioner's conviction without written opinion and without relying upon federal or state Constitutional grounds.

REASONS FOR DENYING THE WRIT

The Supreme Court of Mississippi in the instant case did not pass upon the issue of whether a person who retains counsel may later raise a claim of ineffective assistance of counsel. The notes of the court reporter were stricken without written opinion, and after briefs and arguments were presented, the court affirmed with no written opinion. Petitioner has not complied with Rule 23(f), Rules of the Supreme Court of the United States, which requires him to specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal question sought to be reviewed was raised and the method by which it was raised and the way in which it was passed upon by the court. Respondent maintains that the issue now presented was not properly raised in the trial court as hereinafter set forth in Respondent's Argument, and the State Supreme Court did not base its decision on federal or state Constitutional grounds.

ARGUMENT

It is well established that this Court will not decide federal Constitutional issues raised here for the first time. *Cardinale* v. *Louisiana*, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969).

It is also well established that it will be assumed that where the highest State Court has failed to pass upon a federal question, the omission was due to want of proper presentation in the state courts, and the burden of showing otherwise is on the aggrieved party. *Street*

v. *New York*, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969).

It is the position of the State of Mississippi that Petitioner's sole federal question presented by his petition has never been passed upon in any of the courts of the State, because it was not properly preserved in the trial court.

In *Fitzgerald* v. *Estelle*, 505 F.2d 1334, 1338 (5th Cir. 1975), the court stated:

> If a retained counsel's actions do not sap the proceedings' fundamental fairness, but are challenged as less than reasonably effective in violation of the Sixth Amendment, state involvement through actual or constructive awareness of the error by the judge, prosecutor, or other responsible official who could have corrected it, must be shown.

Petitioner made no effort to show to the trial court or to the State Supreme Court that he was denied reasonably effective assistance of retained counsel other than merely alleging same in response to the State's motion to strike the notes of the court reporter. Petitioner's bare allegation did not properly present the matter to the State Supreme Court. Furthermore, Petitioner has not exhausted his state court remedies in that no petition for a writ of error coram nobis was filed after the conviction was affirmed which would have brought before the state court the Petitioner's allegation of the violation of his Constitutional rights. In the absence of a showing to the contrary, it must be assumed that the court's refusal to pass upon the federal question was due to a lack of proper presentation in the state courts. In addition, the court had adequate state grounds to support its decision

to strike the notes and its affirmation of the conviction. This court has said it will not review a case even though it contains a federal question if there is an adequate state ground that supports the decision of the court. This principle is stated in *Henry* v. *Mississippi*, 379 U.S. 443, 446, 447, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965), in which this Court also stated:

> These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest.

At the time of its order to strike the notes, the Mississippi Supreme Court had consistently applied the statutory notice requirement and had consistently held that notice to the court reporter was jurisdictional, and unless the statutory mandate was met, the notes would be stricken on appeal upon the motion of the adverse party. SEE: *Fields* v. *State*, 272 So.2d 650 (Miss. 1973). In the instant case, notice was not timely. It is Respondent's position that Section 9-13-33, Mississippi Code of 1972 serves a legitimate state interest and was the basis for the court's decision to strike the court reporter's notes. The jury instructions argued in Petitioner's brief remained in the record to be argued. Since the court's ruling was grounded on a procedural rule that serves a legitimate state interest, we respectfully submit that this court should not now consider the question before it.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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and

By: CATHERINE WALKER
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Of Counsel

CERTIFICATE

I, Catherine Walker, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief for Respondent in Opposition to William Sebastian Moore, 514 Barnett Building, Jackson, Mississippi 39201.

This, the 17th day of September, A. D., 1975.

CATHERINE WALKER
Special Assistant Attorney General